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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 MACLEAN TOWNHOMES, LLC, a
9 Washington limited liability company, as
assignee of American Heritage Builders, a
Washington corporation,

10 Plaintiff,

11 v.

12 CHARTER OAK FIRE INSURANCE
CO., a foreign insurance company,

13 Defendant
14

CASE NO. C06-1093BHS

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION FOR
LEAVE TO ISSUE
SUBPOENA TO THORSRUD
CANE & PAULICH

15 This matter comes before the Court on Plaintiff's Motion for Leave to Issue
16 Subpoena to Thorsrud Cane & Paulich. Dkt. 172. The Court has considered the
17 pleadings filed in support of and in opposition to the motion and the remainder of the file
18 and hereby grants in part and denies in part the motion for the reasons stated herein.

19 **I. PROCEDURAL AND FACTUAL BACKGROUND**

20 On August 3, 2006, Plaintiff MacLean Townhomes, LLC, filed a complaint for
21 declaratory relief and monetary damages against Defendant Charter Oak Fire Insurance
22 Co. Dkt. 1. Plaintiff's claims are based on the assignment of an insurance contract
23 between assignor American Heritage Builders (AHB) and Defendant Charter Oak. Dkt.
24 56 at 1.

25 On December 18, 2007, the Court issued a scheduling order requiring discovery to
26 be completed by May 12, 2008. Dkt. 63. On May 8, 2007, Mark Thorsrud of the law
27 firm of Thorsrud Cane & Paulich appeared in this action for Defendant. Dkt. 28.
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1 On July 27, 2007, the parties exchanged their initial disclosures. Second
2 Declaration of Michael J. Crisera (“Second Crisera Decl.”), Dkt. 127, Exh. C. In its
3 initial disclosures, Defendant did not list Mr. Thorsrud as a potential fact witness. *Id.*
4 Plaintiff asserts that:

5 at no time before the May 12, 2008 discovery cut-off date in this case did
6 Charter Oak seek to amend its initial disclosures to list Mr. Thorsrud as a
7 potential fact witness. Moreover, at no time prior to the discovery cut-off
8 did Charter Oak ever indicate it believed Mr. Thorsrud should be a witness
9 in the matter, even though Charter Oak now claims Mr. Thorsrud is a
10 “witness” to events occurring in 2004.

11 Dkt. 126 at 2.

12 On June 2, 2008, the law firm of Cole Lether Wathen & Leid, PS, associated as
13 counsel for Defendant and appeared in this action. Dkt. 110. Defendant’s counsel claims
14 that he informed Plaintiff’s counsel on June 3, 2008, that Mr. Thorsrud would be a
15 potential fact witness. Declaration of Thomas Lether, Dkt. 140 ¶ 2. Defendant’s counsel
16 also claims that he has repeatedly advised Plaintiff’s counsel that Mr. Thorsrud would be
17 available for a deposition at Plaintiff’s convenience. *Id.* ¶ 5.

18 On June 13, 2008, Plaintiff filed a Motion to Strike Defendant’s Supplemental
19 Witness Disclosure. Dkt. 126. On July 22, 2008, the Court denied Plaintiff’s motion
20 allowing Defendant to use Mr. Thorsrud as a fact witness. Dkt. 168.

21 On July 31, 2008, Plaintiff filed a Motion for Leave to Issue Subpoena to Thorsrud
22 Cane & Paulich. Dkt. 172. On August 11, 2008, Defendant responded. Dkt. 177. On
23 August 15, 2008, Plaintiff replied. Dkt. 180.

24 II. DISCUSSION

25 As a threshold matter, Defendant has produced some of the material requested in
26 Plaintiff’s proposed subpoena. *See* Dkt. 177-2, Declaration of Thomas Lether, ¶¶ 2-4.
27 The remaining issue before the Court is whether Defendant must produce documents
28 withheld because the material contains attorney-client communications involving Mr.
Thorsrud. *Id.* ¶ 6.

1 Plaintiff argues that (1) Defendant may not assert attorney-client protection for
2 materials that were generated or obtained while Mr. Thorsrud was acting as a claims
3 investigator and (2) Defendant's offering of Mr. Thorsrud's testimony waives the
4 attorney-client privilege. Dkt. 172 at 7-12.

5 Under the *Erie* doctrine, a federal court sitting in diversity applies federal
6 procedural law and the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304
7 U.S. 64, 78 (1938); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003).
8 The attorney-client privilege, as a substantive evidentiary privilege, is governed by state
9 law. *See* Fed. R. Evid. 501; *Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662, 666 (W.D.
10 Wash. 2007).

11 In Washington, an attorney or counselor shall not, without the consent of his or her
12 client, be examined as to any communication made by the client to him or her, or his or
13 her advice given thereon in the course of professional employment. RCW 5.60.060. It
14 protects only communications and advice between attorney and client in the context of a
15 professional relationship involving the attorney as an *attorney*, not documents that are
16 prepared for some other purpose. *See, e.g., Schmidt v. California State Auto. Ass'n*, 127
17 F.R.D. 182, 183 (D. Nev. 1989); *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421 (1981).
18 The burden of establishing privilege rests on the party asserting it. *VersusLaw, Inc. v.*
19 *Stoel Rives, LLP*, 127 Wn. App. 309, 332 (2005).

20 **A. Mr. Thorsrud's Involvement in the Underlying Claim Investigation**

21 Plaintiff claims that "the record reflects that [Defendant] used Mr. Thorsrud to
22 seek information from AHB for the purposes of assisting [Defendant's] coverage
23 investigation." Dkt. 180 at 2. Specifically, Plaintiff assert the following:

24 Mr. Thorsrud's declaration demonstrates that he was involved on
25 [Defendant's] behalf in requesting documents from AHB for [Defendant's]
26 coverage investigation and mediation preparation, and that Mr. Thorsrud's
27 firm took delivery of documents produced by AHB in response to the
28 document requests made by [Defendant's] coverage adjuster Jeff Belden.

1 Dkt. 172 at 8. Plaintiff's characterization of Mr. Thorsrud's involvement is contradicted
2 by both the record and Mr. Thorsrud's declaration in opposition to this motion.

3 The exhibits cited by Plaintiff show that Mr. Thorsrud was preparing for an
4 adversarial proceeding when he was requesting documents relating to the claims and the
5 damages. *See* Dkt. 139-3, Exh. 7-11. In fact, Mr. Thorsrud was preparing for mediation
6 of the underlying litigation. *Id.* Moreover, Mr. Thorsrud states that he was hired as a
7 coverage attorney and obtained information only for the purpose of providing legal
8 advice. *See* Dkt. 177-4, Declaration of Mark Thorsrud, ¶¶ 3-7.

9 Defendant has establish that Mr. Thorsrud was acting as an attorney in preparing
10 for the particular mediation in question. Therefore, to the extent that Plaintiff's motion
11 seeks the production of communications because Mr. Thorsrud was acting as a claims
12 investigator, Plaintiff's motion is denied. Mr. Thorsrud may assert the attorney-client
13 privilege to protect documents regarding this issue.

14 **B. Waiver**

15 In Washington, "offering an attorney's testimony concerning matters learned in the
16 course of his employment waives the attorney-client privilege." *Kammerer v. Western*
17 *Gear Corp.*, 96 Wn.2d 416, 420 (1981).

18 Defendant has disclosed that "Mr. Thorsrud may be asked to testify in regard to his
19 role as coverage counsel and efforts to resolve the subject underlying claim." Dkt. 177-3
20 at 2 (supplemental witness disclosure). Defendant has represented that Mr. Thorsrud's
21 testimony should not extend beyond his June 26, 2008 declaration. Dkt. 138 at 11. In
22 that declaration, Mr. Thorsrud states facts that occurred from November 2004 to January
23 2005. *See* Dkt. 139, ¶¶ 3-14. Mr. Thorsrud also makes conclusions that Defendant was
24 unable to prepare for and participate in the mediation of the underlying lawsuit because
25 AHB withheld material from Defendant. *Id.* Defendant's preparation for that mediation
26 would most likely involve matters that Mr. Thorsrud learned in the course of his
27 employment for Defendant.

1 Plaintiff claims that

2 There is no way Mr. Thorsrud could provide this testimony about
3 [Defendant] as a fact witness unless his testimony derives from
4 communication he had with [Defendant] concerning (1) [Defendant's]
5 investigation into AHB's insurance claim; (2) [Defendant's] preparations
6 for the AHB/MacLean mediation; and (3) AHB's alleged non-cooperation
7 with [Defendant] and the resulting prejudice suffered by [Defendant].

8 Dkt. 180 at 4. The Court agrees. Defendant's argument that Mr. Thorsrud's "proposed
9 testimony has nothing whatsoever to do with Mr. Thorsrud's communications with
10 [Defendant]" is unsupported both by the record and by Defendant's own representation as
11 to the scope of Mr. Thorsrud's testimony.

12 Defendant's intent to call its attorney is sufficiently definite to constitute waiver of
13 the attorney-client privilege even if Defendant elects not to call Mr. Thorsrud as a witness
14 at the reasonableness hearing or at trial. *See Kammerer*, 96 Wn.2d at 420. Moreover,
15 Defendant's waiver cannot be delayed until either of those proceedings. *Id.* (citing
16 *Phipps v. Sasser*, 74 Wn.2d 439 (1968)).

17 Therefore, Plaintiff's request for documents that have been withheld based on an
18 assertion of the attorney-client privilege is granted because Defendant has waived this
19 protection by offering the testimony of its attorney Mr. Thorsrud. Defendant is ordered to
20 produce any document withheld because of attorney-client privilege that relates to Mr.
21 Thorsrud's "role as coverage counsel and efforts to resolve the subject underlying claim."

22 Defendant notes that the trial court has discretion to conduct an *in camera*
23 inspection of the documents that it has withheld. Dkt. 177 at 6-7 (citing *Escalante v.*
24 *Sentry Insurance*, 49 Wn. App. 375 (1987)). Defendant states, however, "that the real
25 question in this case with respect to these documents and/or communications will not be
26 answered by way of an *in camera* review." Dkt. 177 at 9. Although Defendant's "real
27 question" has been answered, the Court will allow such an inspection. This exercise of
28 discretion shall not be used as a delay tactic for the production of these documents.

Defendant shall deliver documents to the Court no later than August 28, 2008 at 5:00
P.M.

1 **C. Richard Dykstra's File**

2 Defendant claims that if the attorney-client privilege is waived as to Mr. Thorsrud,
3 then it should likewise be waived as to AHB's former counsel Richard Dykstra. Dkt. 177
4 at 9. It should be noted that Defendant asks for relief from the Court without following
5 the proper procedures outlined in Local Rule 7. For this reason, Defendant's request may
6 be stricken. The Court, however, will briefly address this issue.

7 Plaintiff claims that it will not offer Mr. Dykstra in its case in chief at either the
8 reasonableness hearing or the trial. Dkt. 180 at 5-6. The above authorities for attorney-
9 client waiver do not apply to rebuttal testimony. And, even if they did, it would be
10 illogical to order that waiver before the testimony was offered.

11 Therefore, Defendant's request is denied.

12 **III. ORDER**

13 Therefore, it is hereby

14 **ORDERED** that Plaintiff's Motion for Leave to Issue Subpoena to Thorsrud Cane
15 & Paulich (Dkt. 172) is **GRANTED in part** and **DENIED in part** as stated herein.

16 DATED this 25th day of August, 2008.

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20 BENJAMIN H. SETTLE
21 United States District Judge
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